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No. 04-478

Supreme Court, U.S.
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Supreme Court of the United States

STEVEN LOFTON, *et al.*,

Petitioners,

—v.—

SECRETARY OF THE FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES, *et al.*,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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THIS CASE PLAINLY POSES THE QUESTION WHETHER FLORIDA MAY, IN ORDER TO EXPRESS ITS DISAPPROVAL, REFUSE TO EVALUATE GAY PEOPLE AS ADOPTIVE PARENTS.

This case presents a critically important and properly raised question of constitutional law: May a state use its adoption laws to express the state's disapproval of gay people? Florida argues that the Court should not take this case for two reasons, both of which miss the mark.

First, Florida contends that petitioners did not preserve their claim that the challenged statute burdens the protected liberty recognized in *Lawrence v. Texas*, 539 U.S. 558 (2003). Petitioners, the State says, raised the issue too late. In fact, petitioners made this claim at their first opportunity, it was thoroughly addressed by the parties and the Court of Appeals, and no further development of the record would be helpful in deciding the issue before this Court.

Florida also asserts that petitioners did not challenge a chief rational basis asserted in support of the law, a hypothetical child welfare rationale. Opp. Cert., at 4. Since the undisputed record establishes that the true purpose of Florida's law was to express disapproval of gay people, its *post hoc* reliance on a hypothetical rational basis is legally irrelevant. Moreover, while petitioners did not offer an empirical challenge to one of the premises on which the State's hypothetical argument was based, they showed both in theory and in fact that the law could not rationally be thought to promote a legitimate aim.

A. A More Complete View of the Record.

In making its argument, the State of Florida overlooked one crucial part of the record and took an incomplete look at another.

1. It is undisputed that Florida banned gay people from its adoption process to express its official disapproval of gay people.

Florida has never disputed the record evidence on why it bans adoption by gay people. The undisputed evidence shows that the plain and well-understood purpose of the ban was to tell gay people to go back into the closet. App. 136a, ¶ 113. Similarly, Florida does not dispute the legislative history of the ban laid out in Judge Barkett's dissent from the denial of rehearing in the Eleventh Circuit. That history shows that the exclusion was adopted as part of a political campaign against gay people and that it had nothing to do with child welfare. App. 91a-94a.

2. Florida singles out gay people, and no one else, for categorical exclusion from its adoption process.

Florida suggests that child abusers, substance abusers and spouse abusers are, like gay people, also categorically excluded from the adoption process. Opp. Cert., at 16-18. But the laws the State relies on only exclude those who are arrested, prosecuted *and* convicted of designated violent felonies. (Those convicted of drug—but not alcohol—abuse are excluded only for five years.) Fla. Stat. § 435.045(1)(a). Thus, it is only those who have been adjudicated guilty of the crimes most dangerous to children who are excluded. As the State in fact stipulated, all others whom it knows engage in acts of domestic violence and who have problems with drug and alcohol abuse are not categorically excluded from the adoption process. App. 147a-148a, ¶¶ 1, 3. On the contrary, the State gives a special review to cases involving applicants with "verified findings of [child] abuse" who have not been convicted of felonies. Fla. Admin. Code § 65C-16.005(9)(a)2.

Petitioners did agree that abusers who are found to represent a threat to children are not approved at the end of that evaluation process. App. 148a, ¶¶ 2, 4. Florida, however,

misrepresents that acknowledgment as a stipulation that gay people receive equivalent treatment in the adoption process. Just the opposite is true. Petitioners have argued throughout these proceedings that gay people are excluded without any determination, through a criminal court or an administrative process, that they represent a threat to children. Fla. Stat. § 63.042 (3). This case is about the fact that gay people are denied the very case-by-case evaluation that abusers receive.

B. The applicability of *Lawrence v. Texas* to this case is squarely and fully presented.

It is true that petitioners did not argue that *Lawrence* applied to this case until after this case had been initially briefed and argued in the Eleventh Circuit. That is because *Lawrence* was not decided until then. It is also true that although the right vindicated in *Lawrence* was a "longstanding" right, petitioners did not argue it until *Lawrence* was decided. That is because *Bowers v. Hardwick*, 478 U.S. 186 (1986), foreclosed its application to this case until then. Once *Lawrence* was decided, it was extensively briefed at the Court of Appeals, which treated the issue as properly before it and dealt with it in considerable detail. App. 18a-22a.

There is no need for a more extensive record to decide if *Lawrence* applies to this case. There is no dispute that the adult petitioners are gay; all agree, for example, that Mr. Lofton has been raising Florida children for over 17 years with his partner of 20 years, Roger Croteau. App. 1441a-142a. And there is no dispute that Florida refuses to evaluate gay people as prospective adoptive parents.[1] That is all that is

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[1] The Eleventh Circuit and now the State insist the State only disqualifies gay people who are sexually intimate (App. 39a; Opp. Cert., at 13), although a high ranking DCF official testified that the challenged law bars adoption by all gay people. R. 131 (Deposition of Linda Radigan, at 154-55). It matters

needed to decide if *Lawrence* applies.

If Florida's adoption law were supported by genuine, legitimate state interests, it would be for the District Court on remand to weigh those interests against the protected liberty identified in *Lawrence*. 539 U.S. at 578. But given the undisputed fact that this law was passed to express disapproval of gay people, it cannot survive the heightened scrutiny that *Lawrence* demands under either Due Process or Equal Protection. *Id.*, at 578.

The State's claim that applying *Lawrence* here will require rigorous scrutiny of every factor the State examines in the evaluation process has no merit. Opp. Cert., at 10-11. There is a world of difference between completely excluding someone exercising a constitutionally protected liberty, and asking how an individual's exercise of a liberty affects his or her suitability for a particular adoption. *See Planned Parenthood of Southeastern Pa. v. Casey* 505 U.S.833, 873-77 (1992) (regulation that has an incidental effect on a protected liberty is reviewed more deferentially than one that places a substantial burden on it); *compare Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *with Lyng v. Castillo*, 477 U.S. 635, 638 (1986). Besides, if a state takes a constitutionally protected liberty into account in adoption, and has nothing more than disapproval to justify doing so, it should not to be able to take the constitutional liberty into account at all.

C. The issue of whether legislation to express disapproval of gay people is permissible under rational basis review is also squarely presented.

It may be that a purely hypothetical rationale would be enough to uphold a law under rational basis review if there were, as the State puts it, nothing more than "the mere

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not, since *Lawrence* protects the right to be intimate.

presence of some alleged animus in the legislative record . . . ." Opp.-Cert. at. 20; *see Bd. of Trustees v. Garrett*, 531 U.S. 356, 367 (2001). But for two reasons, that is not this case.

First, this is not a case where bias has to be inferred from the lack of any other explanation for a classification. *Cf. Romer v. Evans*, 517 U.S. 620, 634-35 (1996). Nor is this a case where bias has to be inferred from the failure of a supposed rational basis to explain why a group has been singled out while others who are similarly situated receive better treatment. *Cf. Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448-50 (1985).

This is, instead, a case in which the undisputed facts establish that this law was passed to express disapproval of gay people, and for no other reason. Florida did not exclude gay people from its adoption process out of insensitivity or indifference. *Cf. Garrett,* 531 U.S. at 374-75 (Kennedy, J., joined by O'Connor, J., concurring). This law was driven by animosity, "something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.

Second, far from having an agreed-to "rational basis," the law in this case remains bereft of any legitimate rationale that makes any sense at all. It is true the petitioners agree, as they always have, that promoting the best interests of children is a legitimate goal. R. 129, at 4-5. It is also true that, like the State, petitioners offered no expert testimony about the comparative virtues of gay people and heterosexuals as parents.[2] R. 117, 119, 129, 130.

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[2] The State suggests that after the summary judgment motion, petitioners attempted to supplement the record to provide expert testimony on the comparative ability of gay people and heterosexuals as parents. Opp. Cert., at 3. But the evidence, which the Eleventh Circuit ruled belonged in the record, was directed at the plaintiff families' expectation of permanence, relevant to the separate Due Process claim not before this Court, and the impact of abuse on children, relevant to the State's failure to categorically

But not offering expert evidence to refute the premises on which a rational basis argument is based is hardly the same thing as failing to challenge the argument at all. While one may offer evidence to show that one or more of the assumptions that lie beneath a rational basis argument are in fact untenable (*see Minn. v. Cloverleaf Creamery Co.*, 449 U.S. 456, 463-4 (1981)), the far more common practice is to show that the argument makes no logical sense in theory (*see Romer*, 517 U.S. at 632–34; *Hooper v. Bernalillo County*, 472 U.S. 612, 618-20 (1985)), connects as a matter of logic to a purpose that is not legitimate (*see Cleburne*, 473 U.S. at 448-50), or cannot be sustained purely as a matter of logic in light of admitted facts (*see Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County, W. Va.*, 488 U.S. 336, 343-44 (1980); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 536-38 (1973)).

Petitioners in this case use all three techniques to demonstrate that Florida's "rational basis" is irrational.

First, petitioners point out that Florida's suggested rationale is based on a negative stereotype since it is based on the assumption that gay people as a group are inferior as parents. An unsubstantiated negative stereotype cannot provide a legitimate basis for discrimination. *Cleburne*, 473 U.S. at 448-50. Significantly, the State not only refuses to substantiate its charge, the charge is in fact undercut by its own child welfare officials, who testified that they know of no child welfare basis to exclude gay people from adopting, and the State's own practice of permanently placing children with gay parents.[3] App. 135a, ¶¶ 5-8; App. 148a, ¶¶ 6-11.

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exclude abusers. See R. 144, 145. It was not offered to refute empirically the State's assertion that married heterosexual couples are optimal.

[3] In this Court for the first time, Florida has suggested not that placement with married heterosexuals is "optimal," R. 117, at 16, but that placement with gay

Second, petitioners show that it is logically impossible to think that excluding gay people from the evaluation process will have the effect of placing children with married heterosexuals. The State places children with every qualified married heterosexual couple willing to adopt that it can find. It has thousands ready for adoption left. It places children with all the qualified single heterosexuals willing to adopt it can find. It has thousands ready for adoption left, and their numbers are apparently growing alarmingly. App. 149a-150a, ¶¶ 15-17, 23-25; *Amicus* Brief of Child Welfare League of America in support of *certiorari*, at 8. With a large and growing surplus of children eligible to be adopted, it is not rational to think keeping gay people out of the process will increase the number of placements with heterosexuals.

Finally, petitioners point out that it is simply not credible that Florida categorically excludes gay people from the process to benefit children, when at the same time it: 1) permanently places children in its care with gay people, and 2) allows substance and domestic abusers to apply and be evaluated. Florida tells this Court that permanent placement with gay people is not the same thing as adoption, which confers the right to inherit, a parent's name, and a duty of support. Opp. Cert., at 15. But Florida does not explain how it serves the best interest of its children by giving them *de facto* permanent gay parents but denying them the right to inherit, their parents' names, and the obligation of support.

What remains is what the State tells this Court is Florida's desire to promote "public morality." The State explained to the District Court what precept of "public morality" it aimed to promote with this law:

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people would be "harmful." Opp. Cert., at 2. That even more negative stereotype is similarly unsubstantiated and, at the very least, is hardly credible in light of its decision to place children in *de facto* permanent placements with gay parents.

> It is constitutionally permissible to enact legislation in furtherance of public morality, to express moral disapproval of homosexuality.

R. 117, at 16-17.

The issue of whether Florida may use its adoption law to express its disapproval of gay people is thus squarely presented by this record.

D. The case for review by this Court grows stronger with the passage of time.

1. Even though the sessions of most state legislatures have not yet begun, there is already a proposal in Kentucky that would bar gay people from adopting or being foster parents. H.B. 661, Reg. Sess. (Ky. 2004). Similar legislative proposals are expected in other states. As the Child Welfare League of America points out in its brief in support of the petition, proposals like this one would overturn well-established child welfare practice and exacerbate an already critical shortage of adoptive parents. *Amicus* Brief of Child Welfare League of America in support of *certiorari*, at 7-10. State legislatures should know whether their adoption laws are to be based on the best interests of children or whether they can, like Florida, pass them to express disapproval of gay people.

2. The State's Brief in Opposition is a fine illustration of just how litigants are attempting to evade this Court's decisions in *Lawrence* and *Romer*. The opposition, like the panel at the Court of Appeals and like the courts in *Equality Found. v. Cincinnati*, 128 F.3d. 289 (6th Cir. 1997), *cert. den.*, 525 U.S. 943 (1998), and *Kansas v. Limon*, 32 Kan. App. 2d 369 (2004), *rev. granted* (Kan. May 25, 2004), insists that states may discriminate against gay people to express their disapproval so long as that disapproval is labeled "public morality." It insists, like the panel and the courts in *Shahar v.*

Bowers, 114 F.3d 1097 (11th Cir. 1997), *cert. den.*, 522 U.S. 1049 (1998), and *Limon*, that *Romer* only forbids discrimination for its own sake in measures that are sweeping in their breadth. The Brief in Opposition insists that neither *Griswold v. Conn.*, 381 U.S. 479 (1965), *Eisenstadt v. Baird*, 405 U.S. 438 (1972), nor *Lawrence* itself recognize a protected liberty in private adult intimacy, and that *Lawrence* is a minimum scrutiny rational basis case essentially limited to the situation that gave rise to it.

That litigants will make arguments like these is perhaps to be expected. That Courts of Appeals and state appellate courts would accept them is not. It is time for this Court to make it clear once and for all that the Constitution does not permit a state to legislate about children so that it can tell the world that it disapproves of gay people.

Respectfully submitted,

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